Filed 3/27/19 P. v. Hunt CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. NATHAN JOSEPH HUNT, Defendant and Appellant.	C084821 (Super. Ct. No. NCR97113)

Convicted by jury of possession of a firearm by a felon on or about January 6, 2016 (Pen. Code, § 29800, subd. (a))[1] and found by the trial court to have one strike based on an out-of-state conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), defendant Nathan Joseph Hunt contended in his original brief that the trial court erred prejudicially by failing to give a unanimity instruction. We subsequently granted defendant leave to file supplemental briefing on the question whether, in light of *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), issued after defendant's conviction and sentence and the filing of this appeal, the trial court was required to limit its inquiry to the

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1 Undesignated statutory references are to the Penal Code.

elements of the prior conviction in resolving whether it qualified as a strike. Thereafter, we directed the parties to file supplemental letter briefs addressing the specific issue of whether defendant's prior conviction qualified as a strike under section 1192.7, subdivision (a)(31), assault with a deadly weapon under section 245.

Having considered the original and supplemental briefing, we shall conclude that the trial court erred in finding that the prior conviction qualified as a strike, reverse the trial court's finding, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 6, 2016, in response to a reported disturbance, Tehama County Sheriff's Deputy Ryan Frank was dispatched to an address on Houghton Avenue in Corning, a property that housed several outbuildings and mobile homes. At the scene, Deputy Frank contacted Tammy S., who said there was a firearm in a fifth wheel trailer on the property, identified by Tammy S. as where defendant lived.[2] Deputy Frank and other deputies went to the trailer and called out defendant on a public address system, ordering him to come out with his hands up. After receiving no response, the deputies approached the trailer's locked door and opened it with a key provided by Tammy S.

Deputy Frank immediately saw a Remington 870 12-gauge pump action shotgun in the living room, standing on the butt with the barrel leaning against a cabinet. Examining the gun, Deputy Frank believed at the time that it was capable of firing.[3]

The deputies went to an apparently occupied mobile home 100 to 200 feet from the trailer, knocked, and announced their presence. Carl Holm answered the door and

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[2] Tammy S. was originally named as a victim of corporal injury on a cohabitant by defendant. After reducing the charge to misdemeanor battery, the People dismissed it before trial. The jury was not informed of any facts relating to that alleged incident.

[3] On later inspection, the deputy discovered the firearm was inoperable because it was missing a bolt.

told them defendant was inside and would be coming out soon. Defendant emerged and was handcuffed.

In a recorded interview with Deputy Frank that was played for the jury, defendant said the firearm had been located by a creek and he had brought it back to the trailer several months ago. He admitted his fingerprints could be on it. However, he never said he owned it.

Defendant said he and Tammy S. had been living in the trailer and were going through a separation. He did not say that he had not been staying there for the last few days or that he had been locked out. He acknowledged that he knew he was not supposed to possess firearms because he was a convicted felon.

Defendant did not testify. His only witness was Holm, the owner of the Houghton Avenue property, who identified himself as defendant's friend. According to Holm, defendant and Tammy S. moved into the fifth wheel trailer about six months before the date of defendant's arrest. After that time, Holm never went into the trailer and did not know what defendant might have brought into it.

At some time before defendant's arrest, Holm noticed a padlock on the trailer door. Holm never saw defendant use a key to open the padlock, and did not see him go into the trailer in the week before his arrest.

At the time Holm noticed the padlock, defendant was "couch surfing" at Holm's residence. As of the time of trial, defendant still lived there rent-free.

DISCUSSION

I

Defendant contends the trial court should have given a unanimity instruction sua sponte because the evidence showed he might have possessed the firearm either on the date of his arrest or before, and it was in dispute whether he had access to the trailer at the time he was arrested. This argument fails because the information charged possession

only on or about January 6, 2016--a fact that defendant omits from both his opening brief and his reply brief.

Background

A unanimity instruction (CALCRIM No. 3502), stating that the jurors must all agree defendant committed the offense on January 6, 2016, was included in the proposed instructions. However, during the instructions conference the prosecutor withdrew it, apparently as duplicative of an instruction the trial court gave: "It's alleged that the crime occurred on January 6th, 2016. The People are not required to prove that the crime took place exactly on that day, but only that it happened reasonably close to that day."

Before the end of the instructions conference, the prosecutor returned to the topic: "I just wanted to make sure that there wasn't a sua sponte requirement for the Court to give a unanimity instruction." The trial court replied, "Well, that's if the prosecution presents evidence with multiple acts to prove a single count. [¶] . . . [¶] [a]nd I don't think that's the issue here." The prosecutor agreed. Defense counsel said, "Submit on that, you Honor."

In closing argument, the prosecutor told the jury that defendant had either actual or constructive possession of the firearm, specifically referencing the date of his arrest. The prosecutor also mentioned defendant's statement that he had acquired the firearm months before, but did not assert that the jury could convict him based on that prior possession.

Analysis

"[T]he jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where the evidence justifies a unanimity instruction, the trial court must give it even without a request. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Datt* (2010) 185 Cal.App.4th 942, 951.)

"In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on *two discrete crimes* and not agree on any particular crime or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a *single discrete crime*. [Citation.] In the first situation, but not the second, it should give the unanimity instruction. [Citation.]" (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 570 (*Hernandez*).)

Here, one discrete crime was alleged: possession of a firearm on the date of defendant's arrest. This crime was proven by the evidence that the firearm was in the trailer where he had been living, he admitted having put it there, and he knew that as a felon he was not supposed to possess a firearm. All of that evidence went to the elements of possession and knowledge on the date charged in the information. The jury was not asked to decide whether defendant's possession of the firearm before January 6, 2016, could also justify conviction of possession on that date. Thus, this case presents the second *Hernandez* situation, not the first.

In *Hernandez*, on which defendant relies, the defendant was accused of possessing a firearm on a specific date, but the evidence showed two discrete crimes *on that date*, separated in time, place, and character. The first alleged crime was firing a gun at the victim's house; the second alleged crime was transporting a gun in the engine compartment of the defendant's car, hours later and miles away. (*Hernandez, supra*, 217 Cal.App.4th at pp. 564-566.) Moreover, the defendant presented different defenses to the alleged crimes: as to the first, he denied that he had a gun at the victim's house, but as to the second he claimed he did not have dominion and control over the gun found because the car was not his. (*Id*. at p. 567.) On those facts, the prosecutor's failure to make an election and the trial court's failure to give a unanimity instruction compelled the reversal of defendant's conviction on that count. (*Id.* at pp. 576-578.) Because there

were not two discrete acts alleged on the same date in the present case, *Hernandez* is distinguishable, and the trial court's omission of a unanimity instruction was not error.

In light of this conclusion, we need not decide whether, as the Attorney General urges, the continuous course of conduct exception to the unanimity rule would apply.

II

Defendant contends the trial court erred in concluding that his prior conviction qualified as a strike because (1) a person can be convicted of the Washington offense without personally using a firearm, (2) the Washington offense only requires a mens rea of recklessly, and (3) Washington's definition of accomplice liability is broader than California's. Defendant also asserts that the trial court violated his rights under the Sixth Amendment to the United States Constitution by engaging in impermissible fact finding in violation of *Gallardo, supra,* 4 Cal.4th 120 when it determined that he personally used a firearm in the commission of the Washington offense. As we shall explain, the trial court erred in concluding that defendant's prior conviction qualified as a strike.

Background

The amended information alleged defendant had been convicted of a serious or violent felony, or "strike" (§§ 667, subds. (b)-(i); 1170.12, subd. (a)-(d)) based on a 1999 conviction for "drive-by shooting" in Washington state (RCW § 9A.36.045). Prior to trial, defendant admitted the prior conviction but disputed that it qualified as a strike. Before sentencing, the prosecution submitted documents from defendant's 1999 conviction and argued that the conviction qualified as a strike under section 1192.7, subdivision (c)(8) (any felony in which the defendant personally uses a firearm), (c)(23) (any felony in which the defendant personally uses a dangerous or deadly weapon), (c)(31) (assault with a deadly weapon or firearm in violation of section 245), and (c)(36) (shooting from a vehicle in violation of subdivision (c) or (d) of section 26100). Defendant responded that "[e]ven in light of the Washington record filed herein, it cannot sufficiently be established that the defendant committed the Washington Prior in a

manner that satisfies all of the elements of a California Strike." The trial court found that the prior conviction involved defendant's personal use of a firearm and thus qualified as a strike under section 1192.7, subdivision (c)(8) (any felony in which the defendant personally uses a firearm) and (c)(23) (any felony in which the defendant personally uses a dangerous or deadly weapon).

Analysis

California's "Three Strikes" law requires criminal sentences to be increased when a defendant has been convicted of one or more prior serious or violent felonies, or "strikes." (*People v. Vargas* (2014) 59 Cal.4th 635, 638; see §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) A qualifying strike includes "[a] prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison . . . if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular. . . serious felony as defined in subdivision (c) of Section 1192.7." (§ 667, subd. (d)(2).) In turn, section 1192.7, subdivision (c) lists many offenses that constitute " 'serious felon[ies],' " including "any felony in which the defendant personally uses a firearm," "any felony in which the defendant personally used a dangerous or deadly weapon," "assault with a deadly weapon [or] firearm . . . in violation of Section 245," and "shooting from a vehicle, in violation of subdivision (c) or (d) of Section 26100." (§ 1192.7, subd. (c)(8), (23), (31), (36).)

Under Washington law, "A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge." (RCW § 9A.36.045(1).)

Contrary to the trial court's finding, defendant's prior conviction itself does not necessarily demonstrate that he personally used a deadly weapon. As defendant points out, a person can be convicted of drive-by shooting in Washington without personally

using a firearm. Pursuant to Washington law, a defendant can be convicted of drive-by shooting as an accomplice even if he did not fire any shots. (RCW § 9A.08.020.) Moreover, there is nothing in the record of defendant's prior conviction for drive-by shooting that would support a finding that he personally used a firearm in the commission of that offense. The People do not contend otherwise. Rather, they assert that "[t]he statutory language from the Washington and California offenses . . . supports [the trial court's] finding," and "[t]hus, examination of the record of the earlier proceeding was not required."[4] As detailed above, the statutory language does not support the trial court's finding that defendant personally used a firearm in the commission of the Washington offense. Accordingly, the trial court erred in concluding that defendant's prior conviction for drive-by shooting qualified as a strike under subdivision (c)(8) (any felony in which the defendant personally uses a firearm) and (c)(23) (any felony in which the defendant personally used a dangerous or deadly weapon) of section 1192.7. That, however, is not the end of our inquiry.

The trial court did not address the People's claim that the Washington offense qualified as a strike under section 1192.7, subdivision (c)(31) (assault with a firearm) and (c)(36) (shooting from a vehicle). On appeal, the People assert that the trial court's finding that the Washington offense qualified as a strike should be affirmed because it "includes all the elements of assault with a deadly weapon, and shooting from a motor vehicle, both of which are enumerated 'serious felonies' under California Penal Code section 1192.7, subdivision (c)." Defendant disagrees, arguing that "the Washington

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[4] At the same time defendant pleaded guilty to drive-by shooting, he pleaded guilty to assault in the second degree, which included a special allegation of firearm use. To the extent the trial court relied on defendant's prior conviction for assault in the second degree in concluding that defendant personally used a firearm in the commission of the drive-by shooting, it erred, because that conviction was not alleged in the amended information or admitted by the defendant in this case.

offense does not correspond to the California offenses . . . because the Washington offense only requires that a defendant act with a mens rea of 'recklessly,' " and "Washington's definition of accomplice liability is broader than California's definition."

Defendant cites *United States v. Valdivia-Flores* (9th Cir. 2017) 876 F.3d 1201 (*Valdivia-Flores*) in support of his assertion that "the Washington offense does not correspond to the California offense because Washington's definition of accomplice liability is broader than California's definition." In that case, the court considered whether a conviction for possession of a controlled substance with intent to distribute under Washington state law is an aggravated felony for purposes of federal immigration law. (*Id.* at p. 1203.) In doing so, the court applied the "categorical approach" and " 'look[ed] not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony.' " (*Id.* at p. 1206.) The court held that Washington's drug trafficking statute "is overbroad compared to its federal analogue, and [the defendant's] conviction cannot support an aggravated felony determination." (*Id.* at p. 1209, fn. omitted.) The court reached its conclusion by comparing Washington's definition of aiding and abetting with the federal definition. (*Id.* at pp. 1207-1208.)

The court in *Valdivia-Flores* explained: "The implicit nature of aiding and abetting liability in every criminal charge is sufficiently well-settled that the government in this case does not contest it. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007) (In the United States, 'every jurisdiction--all States and the Federal Government--has expressly abrogated the distinction among principals and aiders and abettors'). Instead, the government contends that Washington's definition of aiding and abetting liability is essentially the same as the federal definition so that they do, in fact, match categorically.

"At the time of [the defendant's] conviction, Washington's aiding and abetting statute stated: 'A person is an accomplice . . . in the commission of a crime if . . . *[w]ith*

knowledge that it will promote or facilitate the commission of the crime, he . . . solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it.' Wash. Rev. Code § 9A.08.020(3)(a)(i)-(ii) (1997) (emphasis added). In contrast, under federal law, 'to prove liability as an aider and abettor the government must establish beyond a reasonable doubt that the accused had the *specific intent* to facilitate the commission of a crime by someone else.' *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005) (emphasis added). Therefore, federal law requires a mens rea of specific intent for conviction for aiding and abetting, whereas Washington requires merely knowledge. [¶] . . . [¶]

"Therefore, the Washington drug trafficking law on its face appears to have a more inclusive mens rea requirement for accomplice liability than its federal analogue. The Washington Supreme Court's case law indicates that the distinction between intent and knowledge is meaningful. *See State v. Thomas*, 166 Wn.2d 380, 208 P.3d 1107, 1111 (Wash. 2009) ('To convict an accomplice of premeditated murder in the first degree, the State need not show that the accomplice had the intent that the victim would be killed. The prosecution need only prove that the defendant knew his actions would facilitate the crime . . . .'); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713, 731-32 (Wash. 2000) ('The accomplice liability statute requires only a mens rea of knowledge . . . . [A]n accomplice, like a felony murder defendant, may be convicted with a lesser mens rea and a lesser actus reus than a principal to premeditated first degree murder.'); *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267, 1273-74 (Wash. 1995) ('Criminal conspiracy requires an element of intent, while accomplice liability requires a lesser culpable state of knowledge.')." (*Valdivia-Flores*, 876 F.3d at pp. 1207-1208, fn. omitted.)

In reaching its conclusion, the court in *Valdivia-Flores* rejected the government's pragmatic argument that under the court's application of the categorical approach, " 'no Washington state conviction can serve as an aggravated felony at all because of [the] accomplice liability statute' and that such a result 'cannot have been Congress's intent.' "

(*Valdivia-Flores, supra,* 876 F.3d at pp. 1208-1209.) The court observed, "The government here merely joins a chorus of those who 'have raised concerns about [the] line of decisions' applying the categorical approach, '[b]ut whether for good or for ill, the elements-based approach remains the law.' *Mathis v. United States*, 136 S. Ct. 2243, 2257, 195 L. Ed. 2d 604 (2016)." (*Id.* at p. 1209.)

We find the court's reasoning in *Valdivia-Flores* persuasive and equally applicable here. At the time of defendant's conviction in this case, Washington's aiding and abetting statute stated, as it did at the time of the defendant's conviction in *Valdivia-Flores*: "A person is an accomplice . . . in the commission of a crime if [¶] . . . [w]ith knowledge that it will promote or facilitate the commission of the crime, he . . . [¶] . . . [s]olicits, commands, encourages, or requests such other person to commit it; or [¶] . . . [a]ids or agrees to aid such other person in planning or committing it." (RCW 9A.08.020(3)(a)(i)-(ii).) California's aiding and abetting law, like federal law, required then, as it does now, that the aider and abettor act with the specific intent to facilitate the commission of the crime by another. (*People v. Beeman* (1984) 35 Cal.3d 547, 560, [proof of aiding and abetting requires that "an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense"].) Therefore, the Washington drive-by shooting statute on its face appears to have a more inclusive mens rea requirement than California's assault with a deadly weapon (§ 245) and shooting from a motor vehicle (§ 26100) statutes.

Because a person can be convicted of the Washington offense of drive-by shooting without proof that he had the intent to commit, encourage or facilitate the commission of that offense, defendant's prior conviction does not satisfy all of the elements of the California offenses of assault with a deadly weapon or firearm under section 245 or shooting from a vehicle in violation of subdivisions (c) or (d) of section 26100, and therefore, cannot support a strike finding under section 1192.7, subdivision (c)(31) or

(c)(36).[5] While a person can be convicted of those offenses without proof that he or she personally used a firearm in the commission of the offense, proof that he or intended to commit, facilitate, or encourage its commission is required.

DISPOSITION

The trial court's determination that defendant's prior Washington drive-by shooting conviction qualified as a strike under California law is reversed. The case is remanded for resentencing. The judgment is otherwise affirmed.

/s/
Blease, J.

We concur:

/s/
Raye, P. J.

/s/
Murray, J.

[5] Because we conclude that there is nothing in the record that would support a finding that defendant personally used a firearm in the commission of the Washington offense or would otherwise support a finding that defendant's prior conviction qualifies as a strike, we need not address defendant's claim that the trial court violated his rights under the Sixth Amendment by engaging in impermissible fact finding, or the People's assertion that defendant forfeited that argument by failing to raise it below.